IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

Nos. 510-511.

MARKET STREET RAILWAY COMPANY, *Appellant*,

v.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, FRANCK R. HAVENNER, C. C. BAKER, ET AL., etc.
Appellees.

REPLY BRIEF FOR APPELLANT.

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REPLY BRIEF FOR APPELLANT.

EVENTS OCCURRING SINCE RENDITION OF THE ORDER OF THE RAILROAD COMMISSION AND OF THE DECISION OF THE SUPREME COURT OF CALIFORNIA.

(Brief for Appellees, pp. 2-3)

Appellees agree that the facts occurring since the rendition of the judgment of the court below should be taken into consideration, and that "this Court, in disposing of this

case, would be free to make whatever decision that justice and equity might require."[1] This is the sum of our own suggestion. We point out, however, that *Interstate Commerce Commission* v. *City of Jersey City*, 322 U. S. 503, cited and quoted by appellees,[2] is not in point. There, this Court refused to set aside the action of the Interstate Commerce Commission in refusing, in the exercise of its discretion, to grant a rehearing. The Court pointed out (322 U. S., p. 514 et seq.) that the rehearing was sought merely "to bring the record up to date"; that to require administrative tribunals to grant rehearings for such purpose would stall indefinitely the enforcement of administrative orders, since there must be a gap between the time the administrative record is closed and the decision is promulgated. And the Court held that petitions for reopening of the record, because of new circumstances, are pleas to the discretion of the Commission and its action on such pleas should be disturbed only in exceptional cases.

The instant case is quite different. Here is no question of a "stale" record. The changes which have occurred have radically altered the entire situation and, quite aside from the stay, have prevented the functioning of the order in accordance with the intent of the Commission at the time the order was promulgated. These changes occurred after the decision of the court below and pending the appeals in this Court. The Commission has not had a chance to consider them. Nothing can be "stalled," for the lines are now owned by the City and are operating—outside the jurisdiction of the Commission—on a 7-cent fare. Appellant's position goes no further than to fulfill its obligation to advise this Court of the present status of the case and to recognize the power of this Court to make such disposition of the case as it deems appropriate in the interests of justice.

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[1] Brief for Appellees, p. 2.

[2] Brief for Appellees, p. 3.

STATEMENT OF THE CASE.

(Brief for Appellees, pp. 4-16)

The discussion under the heading, "Statement of the Case," in appellees' brief is argumentative. We shall, therefore, reply to it under the appropriate headings in the argument, hereinafter set forth.

PRESUMPTION OF LEGAL CORRECTNESS AND VALIDITY OF DECISIONS AND ORDERS OF THE RAILROAD COMMISSION.

(Brief for Appellees, pp. 16-19)

Under the above heading, appellees contend that the decisions of public service commissions are presumptively correct and valid, and "that there is no burden cast upon them to produce one figure or one fact in defense of the rate reduction order involved in this proceeding until such time as appellant has made a prima facie showing to this Court that said rate order is invalid"; "that in a proceeding of this nature the only question for determination by the Court is one of confiscation."[2a] Like comments appear elsewhere in the brief.[3] These remarks have no application to the points appellant urges involving procedural due process of law. As this Court pointed out in *R. R. Comm'n* v. *Pacific Gas Co.*, 302 U. S. 388, 395,[4] and in the other authorities cited in our opening brief,[5] the requirements of procedural due process must be met before the question of confiscation arises; only thus can a record come into existence on which a determination of the question of confiscation can be made.[6]

[2a] Brief for Appellees, pp. 17, 19.

[3] Brief for Appellees, pp. 18, 37, 44.

[4] Quoted at page 54 of our opening brief.

[5] Brief for Appellant, pp. 53-55.

[6] Brief for Appellant, p. 56.

ARGUMENT.

I.

Reply to Appellees' Contention that Appellant Was Accorded Procedural Due Process at Every Stage of the "Rate" Proceeding in Question.

(Brief for Appellees, pp. 20-22)

Under the first subdivision of their argument,[7] and under the heading "Statement of the Case",[8] appellees seek to answer appellant's contention that the order is invalid because made without notice of, or an opportunity for, a hearing on the issue of rates. They refer to three parts of the record as the portions which gave appellant notice that its rates were in issue: (1) the order instituting the investigation,[9] (2) the preliminary statement by Commission Witness Hunter,[10] and (3) the testimony of Commission Witness Mors, including Exhibit 10.[11]

Appellees also assert generally (Brief, p. 15) that they "might point out at great length the many and voluminous exhibits received in evidence" that would show appellant had "ample and notorious notice" (Brief, p. 15). Appellees do not point out any such exhibits or evidence. None exists. Such argument is of the same character as the generalizations in the opinion of the court below that "thirty-three exhibits were introduced," "voluminous annual and monthly reports * * * were by stipulation deemed to be before the Commission," and "oral evidence is contained in three volumes of transcribed testimony" (R. 599-600).

Turning to the specific matters referred to by appellees, the order instituting the investigation (R. 56) provided

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[7] Brief for Appellees, pp. 20-22.

[8] Brief for Appellees, pp. 10-16.

[9] Brief for Appellees, pp. 10, 20.

[10] Brief for Appellees, pp. 10-14.

[11] Brief for Appellees, pp. 14-15.

> "that an investigation be and hereby is instituted upon the Commission's own motion into the reasonableness of the rates, charges, classifications, rules and regulations of the Market Street Railway Company, and also into the reasonableness, sufficiency and adequacy of the operations, service and facilities of said company;"

In other words, the investigation described was as broad as the powers of the Commission. It could have included any or every possible phase of appellant's business and activities. Appellant does not contend that this notice was ineffective to bring it before the Commission. In the absence of any complaint however—and none was filed—it gave no specific notice what course the proceedings would take. In this regard it is substantially identical with the notice considered in the *Morgan* case. As to those proceedings this Court said (*Morgan* v. *United States*, 304 U. S. 1, 19):

> "No specific complaint was formulated and, in a proceeding thus begun by the Secretary on his own initiative, none was required. Thus, in the absence of any definite complaint, and in a sweeping investigation, thousands of pages of testimony were taken by the examiner and numerous complicated exhibits were introduced bearing upon all phases of the broad subject of the conduct of the market agencies."

But the instant case goes far beyond the situation which developed in the *Morgan* case. Here, there was not even a sweeping investigation of all phases of appellant's activities, including rates. Instead, the broad sweep of the investigation described in the order was specifically narrowed by the Commission itself. Appellant and all others participating were told by the Commission that the hearing was to relate to appellant's service, and appellant was specifically instructed by the Commission to direct its evidence to that issue. Pursuant to this specific definition, the hearing was devoted solely to appellant's service; the evidence and argument—not only of appellant but of the

Commission's own witnesses and counsel—was addressed solely to that issue.[12]

The next matter referred to by appellees, as constituting sufficient notice, is Mr. Hunter's preliminary statement, quoted at pages 10-13 of their brief. We wish to make a rather detailed analysis of this contention, for it is significant.

Appellees italicize Mr. Hunter's statement that appellant's monthly reports show the "*original cost of physical properties based upon the valuation as of April 1st, 1921, • • • brought up to date by adding additions and betterments and eliminating retirements*" (p. 11). Next, they italicize a reference by Mr. Hunter to a "*Report on present market value of the Market Street Railway Company*" (p. 11). Next they italicize his reference to a report dated November 16, 1942, the primary purpose of which "*was to give the Commission the benefit of certain studies dealing with the estimated operating results that would obtain in employing a uniform fare structure; • • • The estimates were based upon a 6-cent fare for both properties; • • •*" (p. 12). Finally, they italicize Mr. Hunter's statement that "*further studies and reports will be prepared and presented* [by the Commission's Engineering Department] *dealing in more detail with the elements that should be considered in connection with the investigation now before the Commission. • • • we will investigate • • • studies on rate base figures, the estimated operating results that would obtain under different fare structures*" (p. 13).

Immediately following the above quotation, the Brief for Appellees contains this statement (pp. 13-14):

> "Pursuant to the statement by the witness Hunter • • • this proposed material was received in evidence • • • "

This Court will weigh this representation in the light of the record.

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[12] See the review of the record in our opening brief. Brief for Appellant, pp. 19-38.

The record (R. 368) shows that in the quoted statement Mr. Hunter was not detailing evidence in this proceeding. He was referring to information in the Commission's files when it instituted the present investigation. Whether at the time Mr. Hunter thought all or some of these documents would be pertinent to, and introduced in evidence in, the present proceeding is not known. Before the end of the morning session at which he enumerated these documents, the members of the Commission had made the statements we quote at pages 22-26 of our opening brief, confining the issue to questions relating to appellant's service. Thereafter, the "report on present market value of the Market Street Railway Company," reference to which is italicized on page 11 of appellees' brief, *was never introduced in evidence in this case.* The fare study "based upon a 6-cent fare," reference to which is italicized on page 12 of appellees' brief, *was never introduced in evidence in this case.* The "studies on rate base figures" and "the estimated operating results that would obtain under different fare structures," which Mr. Hunter said the Commission's staff expected to investigate, and reference to which is italicized on page 13 of appellees' brief, *were never introduced in evidence in this case.*[13] In summing up the Commission's entire case, Mr. Hunter pointed out that the evidence prepared and submitted in this hearing by the Commission's staff had been directed to appellant's service (R. 456-457); that this investigation "does not analyze the rate situation" (R. 467).[14]

The final portion of the record referred to by appellees is the testimony of Mr. Mors, "particularly Exhibit 10."[15]

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[13] Appellant's monthly operating reports from 1938 to May, 1943, were made a part of the record by stipulation (R. 378), but these reports contain many matters relating to service. At no time during the hearing were they referred to as having any bearing upon the present fair value of appellant's properties.

[14] See Brief for Appellant, pp. 32-33. We shall answer in a moment appellees' assertion that this statement of Mr. Hunter does not refer to the Commission's entire investigation but only to "the contents of Exhibit 17, which he had before him at the time he was testifying" (Brief for Appellees, p. 15).

[15] Brief for Appellees, p. 14.

Of this exhibit, appellees generalize:

> "Space would not permit the analyzation of all the elements of Exhibit 10 but it does cover, together with the other exhibits introduced in evidence, the entire range of subjects that are conventionally and usually covered in rate proceedings. * * * If appellant did not understand that such evidence is of the very essence of a rate proceeding, then, it must be admitted that appellant has only its own ignorance to blame for misunderstanding the aim and the purport of the proceeding in question."[16]

Appellees are mistaken. Mr. Mors' exhibit is an historical operating report. It does not "cover * * * the entire range of subjects * * * in rate proceedings." To mention only basic essentials, it contains

1. No rate base study;
2. No evidence of what is a fair rate of return on appellant's property;
3. No evidence as to the amount of traffic which could be expected to move under a 6-cent fare;
4. No evidence of the amount of revenues which would be realized from such traffic;
5. No evidence of the expense which would be incurred in handling such traffic.

The sum of Mr. Mors' exhibit, and the issue on which it was presented and to which it related, is best stated by Mr. Hunter, the Commission's own chief witness (R. 456):

> "Mr. Cassidy: Mr. Hunter, are you familiar with the exhibits presented by Mr. Mors and Mr. Hall, and the studies made by them?
>
> A. I am.
>
> Q. Those studies were made under your general supervision?
>
> A. That is correct.
>
> Q. Have you arrived at certain conclusions and recommendations as a result of the various studies?
>
> A. Yes, I have.

[16] Brief for Appellees, pp. 14, 15.

Q. And have you prepared a report?
A. I have."

Mr. Hunter then distributed his Exhibit 17, which summarized the Commission's whole case and which was entitled (R. 279):

> "Conclusions and Recommendations Looking Toward a Betterment in the Service Provided by the Market Street Railway Under War Time Conditions, in Connection with the Investigation by the Commission on its Own Motion In Case 4680. To Be Presented at the Hearing in San Francisco, July 15, 1943."

Thereafter, in referring to all of the Commission's exhibits, and, in particular, to Mr. Mors' exhibit, Mr. Hunter said (R. 456-457):

> "I think our exhibits introduced in this record supports the conclusion that the service on the Market Street Railway should be improved. In our study we have attempted to, first, test the service on the ground through other information and then, from that information, attempt to draw conclusions."

All of Mr. Hunter's testimony is to the same effect. It is a demonstration that no one participating in this proceeding knew that the Commission was conducting a hearing on the reasonableness of appellant's rates; that it contemtemplated a rate reduction order.

Appellees italicize, on page 14 of their brief, references to the treatment in Mr. Mors' exhibit of operating expenses, depreciation practices, revenue, traffic, road and equipment; and they describe these as "the basic elements involved in any rate proceeding."[17] We have noted that these matters—together with the many other matters *not* in this record—would be pertinent in a rate proceeding. They are also pertinent, however, to service problems and, in this proceeding, were introduced and considered solely

[17] Brief for Appellees, p. 15.

in connection with such problems. Particularly were they pertinent to Mr. Hunter's principal service recommendation, that appellant be required to set aside a portion of its temporary war earnings in a special fund, to be used to pick up deferred maintenance after the war.[18] Mr. Hunter's testimony concerning this recommendation shows that a rate reduction order was the furthest thing from his mind (R. 469):

> "I think the thing to do now is to program for the future. I think it is only fair to the Company, who I think is entitled to some prosperity, it has experienced hard times in the last few years, but even with that I think now is the time to lay aside a fund so that when facilities are available they will be in the position to take advantage of them, they will be in a position to pick up the deferred maintenance. If they are to continue in service in this City I see no reason why it should not be a profitable business, even with the competition of the City.
>
> • • • I feel that the Market Street Railway can look ahead to future operations with prosperity if it surrounds itself with modern equipment, and to insure that I think the thing to do is to create a fund, a plan whereby these earnings are impounded. Withdrawals from the fund to be subject to the Commission's approval."

There remains one point to answer. At pages 15-16 of appellees' brief, appellant is accused of misrepresenting the record in quoting Mr. Hunter to the effect that the investigation did not analyze the rate situation. They say that when Mr. Hunter made this statement he was "*addressing himself to the contents of Exhibit 17, which he had before him at the time he was testifying.*"[19]

This is a surprising statement. The point is important. It can be answered only by a rather detailed reference to

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[18] Recommendation 7, Exhibit 17, R. 286.

[19] Brief for Appellees, p. 15.

Mr. Hunter's testimony at pages 456-465 of the record. We already have quoted a portion of this testimony (*supra*, pp. 8-9). Mr. Hunter's testimony was that he is familiar with the "studies" (exhibits) prepared and presented by Mr. Mors and Mr. Hall; that these "studies" were made under his supervision; that he has arrived at certain conclusions and recommendations as a result of these "studies" and that he has prepared Exhibit 17 embodying these conclusions and recommendations. He then discusses these recommendations in the light of all the evidence presented by the Commission. He refers variously to the Commission's evidence as "exhibits," "studies," "study," "checks." Thus, he says "In our study we have attempted to, first, test the service on the ground through other information and then, from that information, attempt to draw conclusions" (R. 456-457); "Mr. Hall's exhibit shows the lack of manpower with respect to getting the schedules out" (R. 460); "Certainly it is the duty of this carrier to do everything in its power to provide the best service possible, and in looking over these charts that have been introduced by Mr. Hall, I think it can be fairly said that there is and should be an improvement in that situation because many of the cars operate ahead of schedule" (R. 464); "Our checks show that the tracks on Market Street are out of balance; the outer tracks are carrying more traffic than the inside tracks" (R. 466); "Our study shows that the Municipal Line is suffering for lack of manpower also" (R. 466). When he refers to "our study" or "studies" he means the facts developed in the Commission's case in support of the conclusions and recommendations in Exhibit 17. It was in this discussion that Mr. Hunter pointed out that this "study and investigation does not analyze the rate situation" (R. 467). When he speaks of this "investigation" he can mean only the instant proceedings which were entitled, "In the Matter of the Investigation * * * of the Market Street Railway Company" (R. 56), and which were in-

stituted by the Commission's order "that an investigation be and hereby is instituted" etc. (R. 56).

We close this discussion by pointing out, first, that the authorities relied upon by appellees are not in point,[20] and, second, that counsel for appellees have not pointed to a single statement in the entire proceedings by any Commissioner, by any witness, by any attorney, which directly or indirectly says that the reason-

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[20] In *American Toll Bridge Co.* v. *Railroad Comm'n. of California*, 307 U. S. 486 (Brief for Appellees, p. 20), the contention that notice and opportunity for hearing were not accorded was not only an afterthought (307 U. S. pp. 492-493), but, as the Supreme Court of California pointed out, the "issues were • • • clearly defined and understood by all parties concerned during the course of the hearing." *American Toll Bridge Co.* v. *Railroad Commission*, 12 Cal. (2d) 184, 207. And see the opinion of this Court, 307 U. S. 486, 492-493).

In *National Labor Relations Board* v. *Mackay Radio & Tel. Co.*, 304 U. S. 333, this Court said (p. 350): "A review of the record shows that at no time during the hearing was there any misunderstanding as to what was the basis of the Board's complaint. The entire evidence pro and con was directed to the question whether • • • the respondent did in fact discriminate • • •. While the respondent was entitled to know the basis of the complaint against it, and to explain its conduct, • • • we find from the record that it understood the issue and was afforded full opportunity to justify the action of its officers • • •."

Railroad Commission of California v. *Pacific Gas & Electric Co.*, 302 U. S. 388, reviewed an order of respondent reported in 39 C. R. C. 49. As the opinion of this Court notes, the proceeding was brought under section 32 of the California Public Utilities Act, which deals specifically with investigations into the reasonableness of rates. The evidence taken before the Commission was not brought before this Court. However, the Court did point out that the reports of the California Railroad Commission showed that extended hearings were had, and the decision of the California Railroad Commission, reported in 39 C. R. C. 52, shows that the evidence in that proceeding dealt directly with the issue of the reasonableness of the utilities' rates.

In *N. W. Bell Tel. Co.* v. *Ry. Comm'n.*, 297 U. S. 471, this Court said (p. 476): "Possibility of doubt as to the purpose of the hearing was removed in its course before the Commission. At the outset the presiding commissioner announced that the purpose was to fix the 1934 rate, a statement which he repeated later in the course of the hearing on the same day. • • • the testimony • • • discloses that both the Commission and the appellant were seeking to estab-

ableness of appellant's 7-cent rate or any other rate was in issue, or that the Commission expected to hear evidence on the reasonableness of appellant's rates, or that the Commission contemplated any order affecting appellant's rates. There are no such statements. We submit that the full and fair hearing required by the due process clause is not satisfied in a case where the issue decided is not once mentioned in a complaint or at the hearing; where, on the contrary, the Commission expressly states that the hearing is to be on an entirely different issue and the hearing in fact is devoted to that issue.

Cf. *N. W. Bell Tel. Co.* v. *Ry. Comm'n*, 297 U. S. 471, 476, quoted *supra* pp. 12-13, footnote.

Surely, if appellant was fairly to be apprised that the reasonableness of its rates was involved, the presiding Commissioner at the outset of the hearing, in reply to Mr. Holm's comment, "I do not know exactly what scope this investigation might take," instead of stating that the investigation was undertaken "that it might result in some improvement of the public transportation for the people of San Francisco," could have explained that the Commission had in mind ordering a reduction of the 7-cent San Francisco rate and desired evidence on that question.[21] Instead of telling Mr. Kahn, appellant's president, that the Com-

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lish the proper rate of depreciation to be applied to appellant's property for 1934. The state court rightly concluded that appellant was afforded a full hearing upon adequate notice that the Commission proposed to fix a depreciation rate for 1934, and that the requirements of due process were satisfied."

The situation in the case at bar is in direct contrast; at the outset the presiding Commissioner announced that the purpose of the hearing was to inquire into the adequacy of appellant's service.

Neither *New York & Queens Gas Co.* v. *McCall*, 245 U. S. 345, nor *Ashbury Truck Co.* v. *Railroad Commission*, 52 F. (2d) 263, support appellees' position. On the contrary both emphasize the requirement that procedural due process of law requires that the party to be affected by the order must be accorded a hearing at which he is apprised of the issues and is afforded an opportunity to offer evidence and cross-examination concerning those issues.

[21] Brief for Appellant, pp. 22-23.

mission would be interested in the Company's program for improvement of service and desired a "presentation from the Company of what the Company itself proposes to do [with respect to service] aside from anything that the Commission may want to recommend or order,"[22] Commissioner Sachse could have told Mr. Kahn that what the Commission wanted was evidence bearing upon the reasonableness of the 7-cent San Francisco rate. Instead of telling Mr. Kahn that the investigation was started "that it might be productive of some improvement in transportation for the people here during this emergency period in particular,"[23] the presiding Commissioner could have warned appellant to be ready at the adjourned hearing to justify its 7-cent San Francisco rate. When summing up the evidence of the Commission's witnesses and pointing out in his Exhibit 17 the conclusions and recommendations which the case made by the Commission supported, Mr. Hunter could have omitted everything in his exhibit and instead written a report attacking the reasonableness of the 7-cent San Francisco rate. When Mr. Appel moved to strike the resolutions relating to the sale of appellant's property on the ground that they were not material to the inquiry before the Commission, instead of overruling the motion on the ground that the Commisssion "pursues a very liberal policy in allowing testimony to go in the record,"[24] the presiding Commissioner could have stated that these resolutions were material because they showed the fair value of appellant's property and were therefore pertinent to the question whether appellant's 7-cent San Francisco rate was reasonable. Instead of merely giving a history of appellant's affairs and particulars relating to its present service, the Commission's witnesses could have devoted their testimony to the

[22] Brief for Appellant, p. 24.
[23] Brief for Appellant, p. 26.
[24] Brief for Appellant, p. 30.

essential facts necessary to a consideration of the reasonableness of appellant's 7-cent rate and the contemplated 6-cent rate. Engineering estimates as to these essential facts—all lacking in this record—could have been made and subjected to cross-examination, explanation, and rebuttal. If this had been done appellant would have had a fair hearing, the Railroad Commission would have had evidence upon which to base its findings and order, and this Court would have had a record from which it could determine whether the ordered rate is or is not confiscatory.

II.

Reply to Appellees' Contention that the Rate Reduction Order is Fully Supported by the Evidence.

(Brief for Appellees, pp. 22-36)

Appellees recognize that "future estimates of revenue, expenses, and earnings must be adjudged in light of projections made by experts and based upon the utility's experience of the present and the past" (Brief, p. 23). But they point to no such testimony in this record, and there is none. They are able only to generalize: "These figures, as will hereafter be shown, *were legitimate computations permissibly deduced from the facts and figures contained in the record*" (p. 5); "It [the appendix to appellees' brief] illustrates the completeness of the record * * * reveals the background for the Commission's opinion and order * * * (and) brings into bold relief the basis for condemning the 7-cent fare and, in lieu thereof, ordering a 6-cent fare established" (p. 24); "Having demonstrated conclusively that the record is adequate in every respect and that the Commission assiduously adhered to that record in its determination, * * *" (p. 29); "The record support for its deliberation is hereinafter discussed" (p. 29); "We have taken the trouble to detail many of the mechanics and formulae by which the ordered reduction was arrived at, even at the expense of an exhausted patience"

(p. 31); "the Court's attention is respectfully called to the detailed financial data contained in Exhibit 10" (p. 33); "The processes utilized in developing each of the factors charged with being mere 'expectations' have been minutely described" (p. 33); "the Commission confined itself to ordering a 6-cent fare established upon concrete and indisputable evidence" (p. 35): "it went no further than to make permissible and lawful use of expert judgment derived from uncontradicted facts" (p. 36).

All of these are simply unsupported general assertions, without reference to the record. The only specific argument occurs in the quotations from appellees' brief in the court below, and particularly in the chart to which that argument relates.[25] And this argument simply demonstrates the lack of evidentiary support for the Commission's order.[26]

In their quoted argument, appellees suggest that the essential facts relating to future traffic, revenue, and expense can be drawn by the members of the Commission from "their knowledge of human experience in ordinary matters of life."[27] It is self-evident that such "knowledge" does not comprehend, without the aid of testimony, the fact that under a 7-cent fare appellant, during the year 1943, would carry 120,000,000 full-fare passengers (an increase of approximately 16,000,000 over the preceding year[28]), and that during the year 1944, under a different and non-competitive fare structure—never before tried—it would carry 136,700,000 full-fare passengers, an increase of 32,700,000 over 1942 (the last calendar year as to which evidence of traffic is in the record), and an increase of 16,700,000 over the estimated traffic for 1943. The very exactness of this last figure—not even in round numbers

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[25] Brief for Appellees, pp. 24-31.

[26] Brief for Appellant, p. 43, et seq.

[27] Brief for Appellees, p. 30.

[28] The company carried 104,119,993 full-fare passengers in 1942. See first two figures in the third column of figures, R. 183 (Exhibit 10).

of millions—carries its own doubts.[29] Nor does such "knowledge of human experience in ordinary matters of life" comprehend, without the aid of any testimony, the fact that it would cost $7,940,000 to carry 120,000,000 full-fare passengers in 1943 and $8,000,000 to carry 136,700,000 passengers in 1944.

As a matter of fact the estimated expense which would be incurred in handling such vast numbers of additional passengers could be arrived at by experts only after a consideration of many difficult factors. For example, with equipment and manpower strained to the utmost, it would be necessary for appellant to acquire additional equipment and manpower. This was especially pointed out by the concurring Commissioners (R. 104). Quite likely, therefore, the cost of hauling the additional passengers would be higher per passenger than the cost of transporting the present passengers within existing capacity. It would be a case of having to buy a second camel for the first straw in the second load.

Sensing the vulnerability of the Commission's allowance of only $60,000 additional operating expenses to take care of the 16,700,000 additional passengers it assumed the 6-cent fare would attract, appellees undertake to compare the $8,000,000 of expenses under the 6-cent fare, not with the expenses of $7,940,000 for 1943, but with the expenses of $7,347,028 for the year ending April 30, 1943. They point out that the difference is $652,972, not $60,000, and contend that this "disposes of any contention raised by

[29] Of course, the figure of 136,700,000 was arrived at arithmetically *after* the Commission had rendered its decision, in an effort to support the revenue figures in the Commission's findings. This is clear from the note on the chart opposite page 25 of appellees' brief. The draftsman points out that "'B' represents 136,700,000 full-fare passengers *required to produce total operating revenue of $8,500,000 estimated under 6¢ fare.*" Obviously all the draftsman did was to compute back from the unsupported revenue figure in the Commission's decision in order to get the "estimate" of 136,700,000. The latter figure was then put forward to support the revenue figure.

appellant that only $60,000 was allowed for additional expense for prospective increase in patronage.''[30]

The $60,000 is not appellant's figure. It is the Commission's. The Commission ordered the 6-cent fare into effect as of the end of 1943 (R. 92). Chronologically, and by the terms of the Commission's own decision, the comparative expense figures clearly are the $7,940,000 allowed for 120,000,000 passengers in 1943, and the $8,000,000 allowed for 136,700,000 passengers in 1944.

Beyond this, appellees in their attempt to relate the $8,000,000 of expense for 1944 to the period ending April 30, 1943, have overlooked another difficulty. Even if expense allowance were related back to the expense for the earlier period, the increase would still be only $652,972. And this amount must cover the cost of transporting, not only the 16,700,000 additional passengers expected for 1944, but also the 7,000,000 additional passengers required to make up the 120,000,000 passengers expected for 1943.[31] In other words, the $652,972 must transport not 16,700,000 passengers but 23,700,000 passengers. The expense figure per passenger still remains an absurd fraction of appellant's actual expense.

Appellees suggest that all of this is no more than the making of ''pragmatic adjustments'' permitted to the Commission under the decisions of this Court.[32] No decision of this Court holds that such ''adjustments'' can supply the lack of evidence on an essential point.

Driven to extremes, appellees also suggest that appellant has no ground to complain until it has tried out the order and experience has demonstrated that it is confiscatory (Brief, p. 35):

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[30] Brief for Appellees, p. 31.

[31] During the twelve months ending April 30, 1943, appellant carried approximately 113,000,000 full-fare passengers. See chart opposite page 25 of brief for appellees.

[32] Brief for Appellees, pp. 8, 32.

"Until the 6-cent fare had been tried and the subsequent facts disproved the Commission's judgment, appellant is hardly in a position to criticize * * *."

This is not the law.[33]

III.

Reply to Appellees' Contention that the Order is Not Based on Matters Outside the Record.

(Brief for Appellees, pp. 37-39)

Appellees admit that the Commission arrived at its figure of operating revenues for the eight months' period ending August 31, 1943, by consulting reports forming no part of the record.[34] In the court below they did not concede that this constituted error.[35] They now admit that perhaps a "technical irregularity" resulted.[36] They seek to palliate this departure from the record by asserting that the Commission merely referred to the reports for "illustrative" purposes; as an "isolated comparison" of no more significance than any "isolated description, adjective, illustration, or comma" in an opinion.[37]

The record does not permit this treatment of the Commission's action. The revenue figure does not appear as an "illustration" in an opinion. It appears in the Commission's essential findings.[38] These findings show that the figure of operating revenues derived from sources outside the record was the "*basis*" upon which the Commission ar-

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[33] *Prendergast* v. *N. Y. Tel. Co.*, 262 U. S. 43, 49, and authorities cited at pages 46-48 of our opening brief. Compare *Driscoll* v. *Edison L. & P. Co.*, 307 U. S. 104, and *Bronx Gas & Electric Co.* v. *Maltbie*, 271 N. Y. 364, 3 N. E. (2d) 512, both involving interim rates under a statute providing—as the California statute does not—for recoupment of losses if interim rates prove inadequate.

[34] Brief for Appellees, p. 38.

[35] Brief for Appellees, p. 38

[36] Brief for Appellees, p. 37.

[37] Brief for Appellees, p. 37

[38] No findings other than those set forth in its decision were made by the Commission.

rived at its estimates of revenue for the year 1943 and, in turn, for 1944 (R. 87):

> "In the eight months' period, January to August, inclusive, of 1943, the operating revenues of the company amounted to $5,689,775, compared with $4,747,856 for the same period in 1942, an increase of twenty per cent. *On this basis* the total for the full year of 1943 under a seven-cent fare may be expected to be about $8,700,000."[39]

In its answer to the petition for writ of review in the court below (R. 20), the Commission itself alleged: "The quotations in the margin also show by what mathematical process the Commission reached its conclusion that a net income of about $500,000 would be earned by the company in the first twelve months under the six-cent fare" (R. 37-38). The first, and, as the Commission itself said, the "basic," figure appearing in the margin is the $5,689,775 operating revenues (R. 37). It is quite apparent that without this figure the Commission might have arrived at a different estimate of revenues for the future. Likewise—and more important—if appellant had been given an opportunity to explain the reports, or to supplement their data, an entirely different (and correct) estimate might have been reached.

Appellees say (Brief, p. 37):

> "Even conceding the existence of an irregularity this court has little or no concern therewith. Its concern is whether the action of the Commission in the totality of its consequences avoids confiscation of appellant's properties."

In our opening brief we pointed out the vice in this contention.[40] The inquiry whether procedural due process has been accorded must precede a consideration of confiscation. A trial *de novo* no longer being accorded, the record upon which the question of confiscation can be determined does not come into existence until the administrative tribunal has

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[39] See also the more complete quotation of the Commission's findings at pp. 38-40 of our opening brief.

[40] Brief for Appellant, pp. 52-56.

granted a hearing and spread upon the record the evidence upon which it acts. The requirement that the tribunal must act upon evidence is not only an essential requirement of due process of law; it is the very foundation of the structure of our present administrative law.

IV.

Reply to Appellees' Argument Under the Heading "Value of the Service Was Properly Considered by the Commission."

(Brief for Appellees, pp. 39-43)

Appellees are unable to refer to any evidence that would support a finding that the value of appellant's service is 6 cents per ride.[41] However, they now concede that the Commission's order cannot be sustained on the theory that the service, independently valued, is worth only 6 cents per ride. In view of this concession, and in view of the fact that the court below was unwilling to sustain the order on this ground,[42] no purpose would be served by further discussion of the point.

V.

Reply to Appellees' Contention that the Order is Neither Invalid Nor Confiscatory.

(Brief for Appellees, pp. 43-44)

On the issue of confiscation, appellees confine their argument to an attempted defence of the Commission's action in accepting the figure of $7,950,000 as the fair value of appellant's properties for rate making purposes. We have answered this contention.[43] Appellees do not discuss our authorities. They simply assert, without support, that

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[41] See Brief for Appellees, pp. 39-41.

[42] See Brief for Appellant, pp. 18-19.

[43] Brief for Appellant, pp. 64-65.

"*market or commercial value can be a test!*" We submit this is contrary to precedent and to sound principles.[44]

Appellees have no answer to our demonstration that, aside from any question of rate base, a 6-cent fare is confiscatory because it will result in an actual operating loss.[45] For this reason we have emphasized here, as we did below, that the question as to the proper rate base is of subordinate importance. Appellees are mistaken in asserting (Brief, p. 7) that we have changed our position on this point.[46]

Appellees say "that appellant, at no time, ever suggested a rate base figure or fair value that should be allowed for its properties for rate making purposes. It has contented itself with criticizing the rate base set up by the Commission."[47] The court below made a like statement.[48] These assertions are incorrect. We have shown that the procedure followed by the Commission gave appellant no opportunity to present evidence at the hearing on the reasonableness of its rates. Immediately after the Commission's order appellant asked for a rehearing. Both in its petition (R. 113), and in argument in support of it,

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[44] "The sale or exchange value of a plant, depends largely upon what it will earn. What it will earn depends upon its rates. If value depends upon rates, and if rates are to depend upon value, the whole scheme of rate making is absurd." (*In Re Michigan State Telephone Co.* (Mich.), P. U. R. 1921C, 545, 555; *In Re Detroit United Railway* (Mich.), P. U. R. 1923E, 282, 289). And see the authorities cited in our opening brief, p. 64.

[45] Brief for Appellants, pp. 66-67.

[46] Appellant's petition for a rehearing is in the record (R. 105-113). One paragraph deals with the rate base (R. 110). The points most strongly emphasized are those emphasized here. In the Supreme Court of California only two pages of our brief were devoted to our position on the $7,950,000 rate base. The points we most strongly emphasized are those emphasized here.

[47] Brief for Appellees, pp. 7-8.

[48] "The petitioner made no offer or attempt to show that the value fixed by the Commission did not represent either the true depreciated legitimate cost or the true depreciated actual cost" (R. 620).

it pleaded for an opportunity to be heard. The petition was denied. In its petition for a writ of review in the court below appellant pointed out that under its actual operating experience for 1943 the Commission's order would result in an operating loss (R. 11-12). We have pointed out in this Court[49] that appellants actual experience shows that if it is compelled to account on the basis of a 6-cent fare for the period from the effective date of the order to the date of the sale of its properties, it will suffer an actual operating loss of approximately $360,000.

At pages 44-45 of their brief, appellees append a statement about "the hopelessly confused position of appellant with regard to any satisfactory depreciation reserve." They refer to accrued depreciation for tax purposes as compared with appropriations to the depreciation reserve.

We do not understand the relevance of this discussion. If it is intended as a suggestion that the historical cost of appellant's properties, less depreciation, would be some figure comparable to the $7,950,000 adopted as appellant's rate base by the Commission, the suggestion is unwarranted. Commission Exhibit 10 notes that the Commission's historical valuation of appellant's properties as of June 30, 1920, brought forward on the basis of appellant's annual reports, gives a value for road and equipment of $25,343,543 (R. 243). However, the record contains no valuation study. Commissioner Sachse points out at R. 99-100 that there is no evidence in the record to show the present value of appellant's properties on an historical cost less depreciation basis.

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[49] Brief for Appell 6, footnote 6.

We respectfully submit that the judgment of the Supreme Court of California should be reversed.

Dated February 23, 1945.

Respectfully submitted,

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